(3)

No. 03-463

Supreme Court, U.S.
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In The

Supreme Court of the United States

JON BEELER,

Petitioner,

vs.

JOHN ROUNSAVALL, MARY GAYLE RAMSEY and THE CITY OF TERRELL, TEXAS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondents respectfully request the Supreme Court of the United States to deny the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

Whether the United States Court of Appeals for the Fifth Circuit properly ruled that "illegitimate animus or ill-will" must be proven in order to sustain a "class of one" cause of action for a violation of the equal protection clause.

Whether the United States Court of Appeals for the Fifth Circuit properly concluded that Respondents' actions were not motivated by "illegitimate animus or ill-will."

Whether the United States Court of Appeals for the Fifth Circuit properly concluded that Petitioner and his neighbor were not "similarly situated."

LIST OF ALL PARTIES

The persons listed below are all parties to the proceeding in the court whose judgment is sought to be reviewed.

1. JOHN ROUNSAVALL

Represented at trial and on appeal by Peter G. Smith, NICHOLS, JACKSON, DILLARD, HAGER, & SMITH, L.L.P., 1800 Lincoln Plaza, 500 N. Akard, Dallas, Texas 75201.

2. MARY GAYLE RAMSEY

Represented at trial and on appeal by Peter G. Smith, NICHOLS, JACKSON, DILLARD, HAGER, & SMITH, L.L.P., 1800 Lincoln Plaza, 500 North Akard, Dallas, Texas 75201.

3. THE CITY OF TERRELL, TEXAS

Represented at trial and on appeal by Peter G. Smith, NICHOLS, JACKSON, DILLARD, HAGER, & SMITH, L.L.P., 1800 Lincoln Plaza, 500 North Akard, Dallas, Texas 75201.

4. JON BEELER

Represented at trial by and on appeal by Michael P. Wortham, NACOL, WORTHAM & ASSOCIATES, P.C., 990 South Sherman Street, Richardson, Texas 75081.

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ABBREVIATIONS

"R" refers to the appellate record and the number that follows the colon refers to the pages cited within the record. For example, "**R 249:** 3-6, 110" means page 249 of the record and pages 3-6 and 110 of the appendix, which is at page 249 of the record

"TR" refers to the Transcript of the hearing on Defendants' Motion for Summary Judgment found at Volume 5 of the Record

"JB Depo" refers to the Oral Deposition of Jon Beeler

"MGR Depo" refers to the Oral Deposition of Mary Gayle Ramsey

"JR Depo" refers to the Oral Deposition of John Rounsavall

"HR Depo" refers to the Oral Deposition of Humberto Rodriguez

"GL Depo" refers to the Oral Deposition of Grady Lawson

"MW Depo" refers to the Oral Deposition of Michael Wortham

OPINIONS BELOW

The opinion of the court of appeals is unreported. The opinion of the district court is unreported.

JURISDICTION

The Court of Appeals entered its judgment on May 7, 2003 (App., infra 1A-7A). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are as follows: 18 U.S.C. § 2; 21 U.S.C. § 841(a)(1); 21 U.S.C. § 841(d); 21 U.S.C. § 841(b)(1)(A)(B); 21 U.S.C. § 846.

STATEMENT OF FACTS

A. Background and Course of Proceedings

Pursuant to the Texas Alcoholic Beverage Code, an operator of a convenience store must apply for a beer and wine permit if beer and/or wine will be sold at the location. The Texas Alcoholic Beverage Code provides that the Texas Alcoholic Beverage Commission ("TABC") and its administrator have the discretionary authority to grant or refuse requested permits ("Beer and Wine Permit"). *See* TEX. ALCO. BEV. CODE §§ 11.43 and 11.46. The City of Terrell's role, through its City Secretary, with regard to a Beer and Wine Permit application is merely to certify "whether the location or address given in the application is in a wet area, and whether the sale of alcoholic beverages for which the permit is sought is prohibited by charter or

ordinance."[1] *See* TEX. ALCO. BEV. CODE § 11.37; (R 249: 3-6, 110 (JR Depo page 31 lines 7-12) (hereinafter pages and lines will be noted pages:lines), 111 (JR Depo 35:12-23; and 36:1-13)). Accordingly, the TABC is the agency with the authority to allow one to sell beer and wine. (R 249: 65 (JB Depo 42:16-19), 66 (JB Depo 46:18-23)).

The Texas Alcoholic Beverage Code provides "[i]f at the time an original alcoholic beverage permit or license is granted for a premises the premises satisfied the requirement regarding distance from schools, churches and other types of premises established in this code and any other law or ordinance of the state or a political subdivision of this state in effect at that time, the premises shall be deemed to satisfy the distance requirements for all subsequent renewals of the license or permit." *See* TEX. ALCO. BEV. CODE § 109.59(a). Moreover, the code provides "[o]n the sale or transfer of the premises or the business on the premises in which a new original license or permit is required for the premises, the premises shall be deemed to satisfy any distance requirements as if the issuance of the new original permit or license were a renewal of a previously held permit or license." *See* TEX. ALCO. BEV. CODE § 109.59(b).

On or about January 24, 1984, Respondent City passed and approved Ordinance 1345. Ordinance 1345 provided that "[i]t shall be unlawful for any person to sell or engage in the business of selling alcoholic beverages within the City where the place of business is situated

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[1] Notably, the City Attorney does not take any action with regard to the certification of an application for a Beer and Wine Permit. Rather, the City Attorney merely advises the City Secretary in the event that the City Secretary seeks advice. (R 249: 110 (JR Depo 31:13-16; and 32:7-9), 129 (JR Depo 105:24 through 106:7), 199 (MGR Depo 30:11-15; 31:6-12; and 31:18-24)).

within three hundred feet (300') of any church, public hospital, or school or other educational institution." (R 249: 284-285) (emphasis added).

In 1990, Petitioner purchased a business named Handy Mart No. 1 ("Handy Mart") from its operators the Stewarts ("Stewarts"). (R 249: 57 (JB Depo 10:8-13; and 11:6-10)). In 1990, when Petitioner purchased Handy Mart it was operating as a convenience store out of a building located at 307 Ninth Street, Terrell, Texas ("Location A"). (R 249: 57 (JB Depo 11:19-23), 59 (JB Depo 19:2-13)). In 1990, when Petitioner purchased Handy Mart it had a TABC Beer and Wine Permit and had been certified by Respondent City to sell beer at Location A. Thus, the former store operator was selling beer and wine from Location A when Petitioner purchased Handy Mart. (R 249: 57, 114 (JR Depo 45:8-12; and 47:3-19), (JB Depo 11:24 through 12:2), 153 (GL Depo 11:25 through 12:10), 207 (MGR Depo 64:6-14)). Every year thereafter, Petitioner was required to apply for a new Beer and Wine Permit and to obtain certification from the City regarding his application for a Beer and Wine Permit. (R 249: 57 (JB Depo 12:3-7), 119 (JR Depo 67:8-23)).

From 1990 until approximately March 15, 2000, Petitioner rented the building located at Location A from Grady Lawson ("Lawson") and operated Handy Mart out of Location A. (R 249: 57 (JB Depo 11:13-17), 59 (JB Depo 19:2-13), 153 (GL Depo 10:21-25), 155 (GL Depo 21:21-23)).

On or about October 6, 1998, Respondent City passed and adopted Ordinance 1939. Ordinance 1939 provides that "[i]t shall be unlawful for any person to sell or engage in the business of selling alcoholic beverages within the City where the place of business is within 300 feet of any church, public hospital or within 1,000 feet of public schools or other educational institutions." (R 249: 286) (emphasis added).

In December 1999, Petitioner decided to relocate Handy Mart from Location A to 305 Ninth Street ("Location B") and told Lawson to rent Location A to someone else. (R 249: 62 (JB Depo 32:11-23), 63 (JB Depo 33:1-6; 33:16-23; and 35:19 through 36:25)). No one had ever been certified to sell beer and wine from Location B; therefore, no one ever sold beer and/or wine from Location B. (R 249: 77 (JB Depo 91:6-13), 154 (GL Depo 15:23 through 16:12), 208 (MGR Depo 67:6-13)). Moreover, as early as 1990, Petitioner had been told that one could not sell beer and wine from Location B. (R 249: 64 (JB Depo 37:22 through 38:23)). Petitioner first heard this information from the Stewarts when he purchased Handy Mart. Lawson and Respondent Rounsavall were also under the impression that one could not sell beer and wine from Location B. (R 249: 116 (JR Depo 55:8-15; and 55:24-25), 117 (JR Depo 58:9-12), 124 (JR Depo 86:11-13; and 87:12-19), 154 (GL Depo 16:8-25), 155 (GL Depo 17:1-11), 159 (GL Depo 33:14-16)).

Prior to January 2000, Petitioner never experienced a delay and/or had any problems obtaining certification from the City regarding Petitioner's application for a Beer and Wine Permit. (R 249: 59 (JB Depo 18:1-4), 65 (JB Depo 42:20 through 43:22)).

In early 2000, Lawson found new tenants ("the Rodriguezes") who would be operating a convenience store named 747 Water Mart out of Location A as soon as Petitioner relocated to Location B. (R 249: 142 (HR Depo 4:8-25), 143 (HR Depo 5:12-14), 146 (HR Depo 19:18-25)).

On or about January 11, 2000, Respondent City issued Petitioner a document indicating that it was certifying Petitioner's Beer and Wine Permit application for Location B. (R 249: 3-6, 66 (JB Depo 45:20 through 46:7), 100, 115 (JR Depo 51:1-8), 118 (JR Depo 62:14-16)).

Some time between January 12, 2000 and February 23, 2000, Lawson came in to check with Respondent Rounsavall as to why Respondent City had certified Petitioner's Beer and Wine Permit considering Petitioner had relocated to Location B. (R 249: 3-6, 109 (JR Depo 28:3-25), 110 (JR Depo 29:6 through 31:1), 115 (JR Depo 51:9-25), 125 (JR Depo 91:16-18), 158 (GL Depo 31:17 through 32:25), 159 (GL Depo 33:14-16), 160 (GL Depo 40:22-25)). Lawson also contacted Respondent Ramsey to determine why the City had certified Location B for the sale of beer and wine. (R 249: 159 (GL Depo 33:4-9), 208 (MGR Depo 65:12-21), 232 (MGR Depo 162:7-25), 233 (MGR Depo 163:1-6)).

In late February 2000, Respondent Rounsavall determined that the City's certification of Petitioner's application for a Beer and Wine Permit for Location B had been issued in error. (R 249: 3-6, 69 (JB Depo 57:9 through 58:4), 114 (JR Depo 47:18-21), 115 (JR Depo 51:9 through 54:18), 119 (JR Depo 68:5-25), 120 (JR Depo 69:1-10), 209 (MGR Depo 71:16-21), 218 (MGR Depo 105:5-9)). More specifically, when the permit was issued in January 11, 2000 to Handy Mart located at Location B, Respondent Rounsavall thought that there was an address change only. (R 249: 3-6, 69 (JB Depo 57:9 through 58:4), 114 (JR Depo 47:18-21), 115 (JR Depo 51:9 through 54:18), 119 (JR Depo 68:5-25), 120 (JR Depo 69:1-10), 218 (MGR Depo 105:5-9)). That is, Respondent Rounsavall thought that a new address number had been assigned to Handy Mart, which occasionally occurs when additional numbers are added to a street. (R 249: 3-6, 69 (JB Depo 57:9 through 58:4), 114 (JR Depo 47:18-21), 115 (JR Depo 51:9 through 54:18), 119 (JR Depo 68:5-25), 120 (JR Depo 69:1-10), 218 (MGR Depo 105:5-9)).

On January 11, 2000, Respondent Rounsavall was not aware that Handy Mart was physically moving from Location A to Location B. (R 249: 3-6, 69 (JB Depo 57:9

through 58:4), 114 (JR Depo 47:18-21), 115 (JR Depo 51:9 through 54:18), 119 (JR Depo 68:5-25), 120 (JR Depo 69:1-10), 218 (MGR Depo 105:5-9)). Immediately after making said determination, Respondent Rounsavall took the necessary steps to file a protest, regarding Handy Mart's application for a Beer and Wine Permit, pending the determination of compliance with the City of Terrell's ordinances. (R 249: 3-6, 116 (JR Depo 55:8-15; and 55:24-25), 132 (JR Depo 119:8-16), 206 (MGR Depo 59:20-23)). As noted above, like Petitioner, Respondent Rounsavall was not aware of anyone ever selling beer and/or wine from Location B and was under the impression that one could not sell beer and wine from Location B. (R 249: 3-6, 116 (JR Depo 55:8-15; and 55:24-25), 117 (JR Depo 58:9-12), 124 (JR Depo 86:11-13; and 87:12-19)).

On or about February 23, 2000, Respondent Rounsavall emailed Respondent Ramsey, City Attorney for the City of Terrell, explaining the situation to her and asking her for guidance. Thereafter, Respondent Ramsey reviewed the applicable ordinances in an effort to advise Respondents City and Rounsavall. (R 249: 3-6, 127 (JR Depo 99:4-12), 194 (MGR Depo 11:22), 199 (MGR 31:25 through 32:1), 200 (MGR Depo 36:9-34), 204 (MGR Depo 49:2-25), 205 (53:24 through 54:13; and 56:7-12), 223 (MGR Depo 124:5-11), 278).

On or about March 3, 2000, Petitioner's attorney, Mr. Michael P. Wortham ("Wortham"), submitted a letter to Respondent Ramsey outlining Petitioner's position that Respondent City should certify Petitioner's Beer and Wine Permit application. (R 249: 174-175 (MW Depo 16:25 through 17:8), 175 (MW Depo 17:24 through 18:12), 250). Respondent Rounsavall did not see this letter. (R 249: 111 (JR Depo 34:7-9), 116 (54:22 through 55:7), 126 (JR Depo 93:14-22; and 94:12-23), 127 (JR Depo 98:23 through 100:13), 222 (MGR Depo 122:22-25), 223 (MGR Depo 123:12-14)). After receiving said letter, Wortham and

Respondent Ramsey had various discussions regarding the subject property in relation to the City of Terrell's Ordinances. (R 249: 203 (MGR Depo 47:1 through 48:5), 237 (MGR 181:3-7)).

On or about March 14, 2000, Lawson's attorney, Mr. David Mallard, submitted a letter to Respondent Ramsey explaining that the premises at Location A had been "grandfathered" to receiving a Beer and Wine Permit and the City's certification for said permit pursuant to Section 109.59(a) and (b) of the Texas Alcoholic Beverage Code. (R 249: 1-2, 218 (MGR Depo 106:19-22), 279).

On or about March 14, 2000, Respondent Rounsavall submitted a letter to Petitioner notifying him that the City was protesting Petitioner's application for a Beer and Wine Permit pending a determination of compliance with the City of Terrell's ordinances in regard to Location B. (R 249: 3-6, 118 (JR Depo 62:3-6), 251).

On or about March 15, 2000, Petitioner ceased operating Handy Mart from Location A because his lease for said location expired and because Petitioner was relocating to Location B to begin operation of his business on or about that same day. Notably, Petitioner continued to operate Handy Mart out of Location A until March 15, 2000 and continued to sell beer and wine from Location A. (R 249: 62 (JB Depo 32:6-10), 64 (JB Depo 39:14-22), 164 (GL Depo 56:14-24)). Immediately thereafter, the Rodriguezes began operating 747 Water Mart out of Location A. (R 249: 65 (JB Depo 41:10-17)).

On or about March 15, 2000, Petitioner filed an Original Petition for Declaratory Judgment and Injunction, Cause No. 56540, seeking that the Court enjoin Respondent City and its agents from: (a) attempting to enforce Ordinance 1939 of the City of Terrell against Petitioner at his new place of business at Location B; (b) continuing to withhold its certification of Petitioner's

application for a Beer and Wine Permit; and (c) from causing Tim Maloney ("Maloney"), agent from the TABC, to not deliver the application and approvals to the TABC for final approval. (R 249: 7-9, 10-31, 177 (MW Depo 26:2-5; and 27:20-22)).

Location B is within: (a) 700 feet of Children's Depot Learning Center; (b) 580 feet of Our Kid's Tree House Child Care; (c) 740 feet of Terrell Christian Academy; and (d) 600 feet of a Terrell Independent School District baseball facility. (R 249: 3-6, 130 (JR Depo 111:21 through 112:7), 281).

On or about March 17, 2001, Respondent Ramsey submitted a letter to Wortham stating that the reason for Respondent City's protest of Petitioner's application was that Location B "appears to be in violation of the City Ordinance and State Law in that the location is within 1,000 feet of an educational institution, namely Terrell Christian Academy." (R 249: 1-2, 178 (MW Depo 31:21 through 32:6), 202-203 (MGR Depo 44:15 through 45:1), 207 (MGR Depo 63:24 through 64:5), 210 (MGR Depo 73:7 through 74:2), 238 (MGR Depo 183:13-15), 252).

On or about March 17, 2000, Wortham submitted a letter to Respondent Ramsey attempting to rebut the City's position regarding Terrell Christian Academy. In said letter, Wortham put Respondent Ramsey on notice that Petitioner had filed Cause No. 56540. (R 249: 178 (MW Depo 32:7-15), 179 (MW Depo 33:4-7; and 34:12-15), 253). Respondent Ramsey was not persuaded by Wortham's letter dated March 17, 2000. (R 249: 210 (MGR Depo 74:3-20)). Importantly, Respondent Rounsavall did not see this letter. (R 249: 111 (JR Depo 31:18 through 34:6)).

On or about March 21, 2000, Respondent Rounsavall submitted an affidavit to the TABC stating the reason for the City's protest of Petitioner's application for a Beer and

Wine Permit for Location B and explaining the factual circumstances related to the City's certification being issued in error on January 11, 2000. (R 249: 3-6, 118 (JR Depo 62:17-25; and 63:10-14), 256).

On or about March 21, 2000, Wortham sent Respondent Ramsey a letter outlining Petitioner's sales and the percentage of said sells which were derived from beer and wine sales. (R 249: 182 (MW Depo 47:6-9), 202 (MGR Depo 43:7-14), 213 (MGR Depo 87:7-15), 257). Importantly, Respondent Rounsavall did not see this letter. (R 249: 109 (JR Depo 26:8-20; 27:24 through 28:2), 127 (JR Depo 97:1-7)).

On or about March 23, 2000, Wortham submitted a letter to Respondent Ramsey outlining his position that Petitioner's application for a Beer and Wine Permit should be certified by Respondents. Importantly, Respondent Rounsavall did not see this letter. (R 249: 183 (MW Depo 51:1-14), 266).

In April 2000, the Rodriguezes obtained their Beer and Wine Permit for Location A. (R 249: 145 (HR Depo 13:8-9)). Respondent City, through Respondent Rounsavall, certified the Rodriguez' application because Respondents determined that Location A was "grandfathered" in to receiving said permit and certification. (R 249: 114 (JR Depo 48:20-23), 118 (JR Depo 64:18-25), 119 (JR Depo 67:4-7), 121 (JR Depo 73:1-25), 131 (JR Depo 115:16-20; and 116:7-13), 139 (JR Depo 145:14-16), 139 (JR Depo 146:3-21), 207 (MGR Depo 64:6-14), 225 (MGR Depo 132:7-11; 133:6-8; and 134:3-25), 229 (MGR Depo 149:2-11)).

On or about April 4, 2000, the Court issued an order granting Petitioner's nonsuit of Cause No. 56540. (R 249: 7-9, 32, 177 (MW Depo 27:20-22)).

On or about April 12, 2000, Respondent Rounsavall submitted a letter to the TABC outlining the reasons for the protest of Petitioner's application for a Beer and Wine

Permit. More specifically, Respondent Rounsavall explained that "the proposed establishment will be located within one thousand feet (1,000') of a public school or other educational institution located in a residential area." (R 249: 3-6, 101).

On or about May 2, 2000, Wortham submitted a letter to Respondent Ramsey once again outlining Petitioner's position that Respondent City should certify Petitioner's Beer and Wine Permit application. (R 249: 185 (MW Depo 58:9-19), 271). Again, Respondent Rounsavall did not see this letter. (R 249: 111 (JR Depo 33:6-17)).

On or about May 5, 2000, Petitioner filed an Original Petition for Writ of Mandamus, Cause No. 56794, seeking, *inter alia*, that the Court issue a writ of mandamus requiring Respondents City and Rounsavall to certify the Petitioner's application for a Beer and Wine Permit. (R 249: 7-9, 33-53, 177 (MW Depo 27:23 through 28:2)).

On or about June 15, 2000, counsel for Respondents, Mr. Jason Marshall, submitted a letter to the TABC articulating Respondents position that the TABC should grant Petitioner's application for a Beer and Wine Permit and that the TABC could not refuse to grant said application based on the City's failure to certify. (R 249: 7-9, 273).

On or about June 28, 2000, the Court dismissed Cause No. 56794 pursuant to Respondents' Plea to the Jurisdiction. (R 249: 7-9, 54).

On or about July 27, 2000, Respondent Rounsavall submitted a letter to the TABC withdrawing the City's protest of Petitioner's application for a Beer and Wine Permit. In said letter, Respondent Rounsavall explained that "[t]he applicant has provided information to the Attorney representing the City of Terrell in this case to certify that while the proposed premises will be within 1000 feet of a public school, based upon information provided by the Applicant, less than 50% of the gross

sales, excluding gasoline sales, will be from the sale of beer and wine, making the City's 1000 foot distance requirement inapplicable." (R 249: 3-6, 72 (JB Depo 71:3-6), 86 (JB Depo 125:20 through 126:7), 102, 121 (JR Depo 74:9-18), 122 (JR Depo 79:11-15), 130 (JR Depo 111:21 through 112:7), 277).

In August 2000, Petitioner obtained certification and a Beer and Wine Permit for Location B. (R 249: 60 (JB Depo 24:11-25), 71 (JB Depo 68:22-25), 86 (JB Depo 126:16-19)). Moreover, Petitioner obtained a renewal for his Beer and Wine Permit without delay. (R 249: 86 (JB Depo 128:17-21)).

Lawson never requested that Respondents City, Ramsey or Rounsavall delay the certification of Petitioner's application for a Beer and Wine Permit. (R 249: 1-6, 129 (JR Depo 106:18-25), 139 (JR Depo 146:3-21), 160 (GL Depo 37:4-9), 165 (GL Depo 57:15-25; 59:13-17; and 59:21 through 60:3), 166 (GL Depo 62:7-11), 204 (MGR Depo 52:6-8), 210 (MGR Depo 76:10-18), 229 (MGR Depo 149:2-11)).

B. Disposition of Issue Below

Petitioner alleges that "[a]s a result of Respondents' actions, Petitioner has been deprived of the equal protection of the laws in violation of the Fourteenth Amendment of the United States Constitution." (R 136). Petitioner pursues a "class of one" equal protection claim. More specifically, Petitioner alleges that Respondents delayed the certification of his application for a Beer and Wine Permit while his neighbor at Location A, the tenant at 307 Ninth Street, obtained certification for a Beer and Wine Permit without delay. The Trial Court properly noted the inadequacy of the evidence proposed by Petitioner to support his inferences, and granted summary judgment. The United States Court of Appeals for the Fifth Circuit

affirmed the summary judgment granted by the Trial Court.

C. Summary of the Argument

More specifically, Petitioner's claims were properly dismissed because: (a) Petitioner failed to demonstrate that Respondents had illegitimate animus or ill will toward Petitioner; (b) Petitioner failed to demonstrate that "illegitimate animus or ill-will" motivated Respondents' actions; (c) Petitioner failed to demonstrate that he was treated differently from others similarly situated with Petitioner; and (d) Petitioner failed to establish that a policy or custom of the City of Terrell deprived him of his equal protection rights under the Fourteenth Amendment. That is, Respondents' relevant actions were taken in an effort to determine whether selling beer and/or wine at Petitioner's new location of business would violate the City of Terrell's Charter or Ordinances. Moreover, Petitioner and the tenant at 307 Ninth Street were not similarly situated because Location A at 307 Ninth Street had received certification from the City of Terrell for a Beer and Wine Permit for many years and before the passing of Ordinance 1939 while Location B at 305 Ninth Street had not obtained the City of Terrell's certification. The Trial Court properly considered the evidence before it, even when viewed in a light most favorable to Petitioner; however, Petitioner failed to raise a genuine issue of material fact regarding his "class of one" equal protection claim.

REASONS FOR DENYING THE PETITION

A. The Circuits are not divided in their interpretation of *Village of Willowbrook* and whether animus or ill will is necessary to prosecute a "class of one" equal protection or selective enforcement claim.

Petitioner alleges that "[a]s a result of Respondents' actions, Petitioner has been deprived of the equal protection of the laws in violation of the Fourteenth Amendment of the United States Constitution." (R 136). Petitioner does not allege that he is a member of a protected class or group. Rather, Petitioner alleges a "class of one" equal protection claim. (R 124-144).

The United States Supreme Court has held that the Equal Protection Clause can give rise to a cause of action on behalf of a "class of one" even when the Petitioner does not allege membership in a protected class or group. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 120 S.Ct. 1073, 1074-75, 145 L.Ed.2d 1060, 1063 (2000). Petitioner asserts that the United States Supreme Court does not require a showing of ill will and/or illegitimate animus to prove Petitioner's "class of one" equal protection claim. Notably, in *Shipp v. McMahon*, the Fifth Circuit extended the United States Supreme Court's holding and held that to establish a "class of one" equal protection claim, a single Petitioner must demonstrate that "an illegitimate animus or ill-will motivated his intentionally different treatment from others similarly situated and that no rational basis existed for such treatment." *Shipp v. McMahon*, 234 F.3d 907, 916 (5th Cir. 2000), *cert. denied* by 532 U.S. 1052 (2001). Notably, the United States Supreme Court denied the petition for writ of certiorari in *Shipp v. McMahon*. Accordingly, illegitimate animus or ill will is critical and its absence will defeat an equal protection challenge. *Shipp*, 234 F.3d at 916. Accordingly, the

Fifth Circuit properly ruled that "illegitimate animus or ill-will" is a necessary element of a "class of one" equal protection claim.

In *Village of Willowbrook, et al. v. Olech,* 528 U.S. 562 (2000), the Supreme Court was reviewing a decision to dismiss a lawsuit pursuant to Federal Rules of Civil Procedure 12(b)(6) for failure to state a cognizable claim under the Equal Protection Clause. The Supreme Court held that it was unnecessary to reach the alternative theory of "subjective at will" relied on by the Seventh Circuit Court of Appeals. *Id.* at 565. It did so because the Petitioner's complaint alleged that the Village's demand was "irrational and wholly arbitrary" as the Village ultimately connected her property after receiving a clearly adequate 15-foot easement when initially the Village intentionally demanded a 33-foot easement as a condition of connecting her property to the municipal water supply where the Village only required a 15-foot easement from other similarly situated property owners. *Id.* In *Olech,* the Supreme Court merely stands for the proposition that single Plaintiffs may bring equal protection claims. Therefore, the decision does not speak to or amend the requirement of an improper motive, such as illegitimate animus, for claims brought by the Petitioner. The *Olech* decision also held the alleged zoning decision was "irrational and wholly arbitrary," and therefore sufficient to state a claim for relief under traditional equal protection analysis. Because the TABC restriction at issue in the instant case is not "irrational and wholly arbitrary," Petitioners complaint is easily distinguished from the complaint at issue in *Olech.*

The Fourth Circuit, in *Greenspring Racquet Club, Inc. v. Baltimore County,* 232 F.3d 887, 2000 WL 1624496 (4th Cir. (Md.)) (unpublished opinion), is misquoted by the Petitioner. In *Greenspring*, the Fourth Circuit held that while "*Greenspring* is free to speculate about the hostility

that local officials directed towards them, in order to state an equal protection claim *Greenspring* also must demonstrate that there is no other legitimate purpose for the law. In other words, the Plaintiff in *Greenspring* must allege that malice and bad faith were the only conceivable basis for enacting a zoning law or zoning restriction, and this they cannot do." *Id.* at *6, quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993).

Petitioner uses the unpublished opinion of *Greenspring* to persuade the United States Supreme Court into perceiving a conflict among the different Circuits in their interpretation of *Village of Willowbrook* and whether animus or ill will is necessary to prosecute a "class of one" equal protection or selective enforcement claim. As cited by *Greenspring* above, there is no conflict as the Fourth Circuit clearly indicated that the Plaintiff in *Greenspring* in its challenge to a zoning restriction by a legislative body must show and demonstrate bad faith and malice in order to sustain an equal protection claim.

As admitted by Petitioner, the Second Circuit and other Circuits cited by Petitioner are not split in their interpretation or application of *Olech*, specifically regarding whether subjective ill will is necessary for a "class of one" claim. *See* Petition, pp. 17-19. Specifically, Petitioner admits that even the Second Circuit is currently of the view that in order to make a "class of one" claim, the Plaintiff must prove either intentionally different treatment of similarly situated persons or subjective ill will. *See* Petition, p. 19. Since the Circuits are not divided in their interpretation of *Olech*, it would be unnecessary to ask the Supreme Court to expand or restrict its opinion in *Olech*.

Assuming *arguendo* that ill will or illegitimate animus is not required to prove a "class of one" equal protection claim, Petitioner's claim nevertheless fails because

Petitioner cannot prove that he was intentionally treated differently from others similarly situated and that no rational basis existed for such treated. These issues will be discussed below.

B. The Court of Appeals properly concluded that Respondents' actions were not motivated by illegitimate animus or ill will.

Petitioner alleges that "Petitioner's change of locations angered his former landlord, who vowed to take whatever actions were necessary to prevent Petitioner from obtaining the permit. The Respondents' intent to drive Petitioner out of business and their actions described [in Petitioner's Second Amended Complaint] resulted at least in part from the requests of the landlord and his ill will and illegitimate animus toward Petitioner." (R 135). In essence, Petitioner argues that because his former landlord was angry with him, Respondents were angry with him too and Respondents acted on that anger. Notably, Petitioner admits that said allegations are merely his assumptions. (R 249: 81 (JB Depo 105:18 through 107:10), 81-82 (JB Depo 108:22 through 110:16)).

In fact, the evidence shows that prior to the events made the subject of the case at bar, Petitioner had never met Respondents Rounsavall or Ramsey. (R 249: 58 (JB Depo 13:7-13; and 13:24-25)). It is unclear how Respondents Rounsavall and Ramsey could have had ill will toward someone they had not even met. Moreover, after January 2000, Petitioner only met with Respondent Rounsavall on three (3) occasions and with Respondent Ramsey on one (1) occasion at which times his discussions with them related to the situation at hand. (R 249: 58 (JB Depo 14:16 through 15:9), 58-59 (JB Depo 16:1 through 17:1), 69 (JB Depo 60:9-22)., 70-71 (JB Depo 62:23 through

68:8), 76 (JB Depo 86:22 through 87:6), 77 (JB Depo 90:9-13)). Petitioner provided no evidence demonstrating that Respondents Rounsavall and Ramsey developed illegitimate animus or ill will based on these meetings or for any other reason; Petitioner alleges that it is his belief that Respondents had illegitimate animus or ill will toward him. (R 249: 82-84 (JB Depo 110:17 through 118:15; and 119:4 through 120:12), 85 (JB Depo 121:2-10; and 124:6 through 125:2)). Petitioner's subjective beliefs alone cannot be the basis for judicial relief. *Cf. Montgomery v. Trinity Indep. Sch. Dist.*, 809 F.2d 1058, 1062 (5th Cir. 1987) (explaining that the simple fact that the Petitioner believes he was the victim of discrimination is not enough for judicial relief). Finally, the record demonstrates that Petitioner's former landlord never requested that Respondents delay the certification of Petitioner's Beer and Wine Permit. (R 249: 1-6, 129 (JR Depo 106:18-25), 139 (JR Depo 146:3-21), 160 (GL Depo 37:4-9), 165 (GL Depo 57:15-25; 59:13-17; and 59:21 through 60:3), 166 (GL Depo 62:7-11), 204 (MGR Depo 52:6-8), 210 (MGR Depo 76:10-18), 229 (MGR Depo 149:2-11)).

Assuming *arguendo* that the Court finds that Respondents had illegitimate animus or ill will toward Petitioner, Petitioner's claim nevertheless fails. More specifically, the "class of one" equal protection cases at bar have been deemed "vindictive action" cases and the courts have held that such cases require proof that "the cause of the differential treatment is a totally illegitimate animus toward the Plaintiff by the Defendant." *Albiero v. City of Kankakee*, 246 F.3d 927, 932 (7th Cir. 2001) (emphasis added) (internal quotations omitted); *Shipp*, 234 F.3d at 916. Thus, "[i]f the Respondent would have taken the complained-of action anyway, even if it didn't have the animus, the animus would not condemn the action. Ill will must be the sole cause of the complained-of action. A showing of uneven law enforcement, standing alone, will

not suffice." *Albiero*, 246 F.3d at 932 (internal quotations omitted).

Petitioner failed to provide any evidence demonstrating that illegitimate animus or ill will caused or motivated Respondents' actions. In fact, the evidence demonstrates that Respondents' actions were motivated by a desire to determine whether selling beer and wine out of Petitioner's new location of business, Location B, would violate the City of Terrell's ordinances and/or state law. More specifically, the City of Terrell's duty, through Respondent Rounsavall its City Secretary, with regard to a Beer and Wine Permit application is to certify "whether the location or address given in the application is in a wet area, and whether the sale of alcoholic beverages for which the permit is sought is prohibited by charter or ordinance." *See* TEX. ALCO. BEV. CODE § 11.37; (R 249: 3-6, 110 (JR Depo 31:7-12), 111 (JR Depo 35:12-23; and 36:1-13)). On or about January 11, 2000, Respondent Rounsavall certified Petitioner's application for a Beer and Wine Permit for 305 Ninth Street ("Location B") in error. (R 249: 3-6, 69 (JB Depo 57:9 through 58:4), 114 (JR Depo 47:18-21), 115 (JR Depo 51:9 through 54:18), 119 (JR Depo 68:5-25), 120 (JR Depo 69:1-10), 218 (MGR Depo 105:5-9)). After learning of this error, Respondent Rounsavall, with the advice of Respondent Ramsey, took the necessary actions to protest Petitioner's Beer and Wine Permit application pending a determination of whether selling beer and wine out of Location B would be in violation of the City of Terrell's ordinances. (R 249: 3-6, 77 (JB Depo 91:6-13), 116 (JR Depo 55:8-15; and 55:24-25), 117 (JR Depo 58:9-12), 124 (JR Depo 86:11-13; and 87:12-19), 132 (JR Depo 119:8-16), 206 (MGR Depo 59:20-23)). Respondent Rounsavall took these actions because no one had ever sold beer and wine from Location B and because Respondent Rounsavall was under the impression that one could not sell beer and wine from Location B. Thus, Petitioner's application for a Beer

and Wine Permit for Location B was equivalent to a new application.

The ordinance at issue in the year 2000, Ordinance 1939, provides that "[i]t shall be unlawful for any person to sell or engage in the business of selling alcoholic beverages within the City where the place of business is within 300 feet of any church, public hospital or within 1,000 feet of public schools or other educational institutions." (R 249: 286) (emphasis added). Petitioner's new location of business, Location B, was within: (a) 700 feet of Children's Depot Learning Center; (b) 580 feet of Our Kid's Tree House Child Care; (c) 740 feet of Terrell Christian Academy; and (d) 600 feet of a Terrell Independent School District baseball facility. (R 249: 3-6, 130 (JR Depo 111:21 through 112:7), 281). Clearly, the ordinance at issue applied. Thus, the evidence demonstrates Respondents' actions in delaying the certification of Petitioner's were motivated by Ordinance 1939 and its application to Petitioner's new location of business, Location B. After making a determination that Petitioner was exempted from the application of Ordinance 1939, Respondent Rounsavall certified Petitioner's application on July 27, 2000. (R 249: 3-6, 72 (JB Depo 71:3-6), 86 (JB Depo 125:20 through 126:7), 102, 121 (JR Depo 74:9-18), 122 (JR Depo 79:11-15), 130 (JR Depo 111:21 through 112:7), 277). Petitioner failed to provide any evidence demonstrating that if his former landlord and/or Respondents were not allegedly angry with him, Respondents would not have taken the requisite actions to determine if selling beer and wine from Location B would violate the City of Terrell's ordinances.

Furthermore, in support of his position that ill will and/or illegitimate animus motivated Respondents' action, Petitioner emphasizes that "the City opposed Petitioner only after being approached by Lawson. Rounsavall's story regarding the change of address is implausible." *See*

Petition, p. 21(6). The evidence demonstrates that some time between January 12, 2000 and February 23, 2000, Lawson came in to check with Respondent Rounsavall and Respondent Ramsey as to why Respondent City had certified Petitioner's Beer and Wine Permit considering Petitioner had relocated to Location B. (R 249: 3-6, 109 (JR Depo 28:3-25), 110 (JR Depo 29:6 through 31:1), 115 (JR Depo 51:9-25), 125 (JR Depo 91:16-18), 158 (GL Depo 31:17 through 32:25), 159 (GL Depo 33:4-16), 160 (GL Depo 40:22-25), 208 (MGR Depo 65:12-21), 232 (MGR Depo 162:7-25), 233 (MGR Depo 163:1-6)). Thereafter, Respondent Rounsavall determined that Petitioner's beer and wine permit application was for a new location, as opposed to a new number being assigned to an old building, and that the permit issued to Petitioner had been issued in error. Respondent Rounsavall then sought to determine whether issuing a beer and wine permit to Location B would violate any city ordinances. Specifically, the record demonstrates that: (1) on February 23, 2000, Respondent Rounsavall submitted an e-mail message to Respondent Ramsey explaining that Petitioner's application "came through as an address change only"; and (2) on March 21, 2000, Respondent Rounsavall signed an affidavit stating "[t]he application for the business came in as a change of address. I was not told it was a change in physical location of the business. It was approved in error upon learning of the location change, the protest was filed." (R 249: 41, 256, 278). Accordingly, the evidence demonstrates what truly motivated Respondents' actions.

Petitioner accentuates that Lawson made numerous statements regarding the fact that he was going to fight Petitioner over the permit, that Lawson attended each hearing involving Petitioner, and that Lawson disliked Petitioner. *See* Petition, pp. 2, 15, and 21(8). Assuming *arguendo* that Lawson disliked Petitioner, Petitioner failed to provide competent summary judgment evidence that

Lawson's ill will or illegitimate animus toward Petitioner was adopted by Respondents. In fact, the only evidence provided by Petitioner that Respondents possessed ill will or illegitimate animus toward Petitioner is an affidavit from Petitioner's attorney, Mr. Michael Wortham, stating that he "believe[s] that [Ramsey] opposed the permit in an effort to aid and/or appeals Lawson and because she simply wanted to do so, regardless of the circumstances or who she affected." (R 297: 26) This is hardly sufficient to establish that Respondent Ramsey and/or Respondents had ill will or illegitimate animus toward Petitioner. Petitioner's and/or Petitioner's counsel's subjective belief that Respondents had ill will or illegitimate animus toward Petitioner is insufficient to overcome summary judgment. *Cf. Swanson v. General Services Administration*, 110 F.3d 1180, 1189 (5th Cir. 1997); *Montgomery v. Trinity Indep. Sch. Dist.*, 809 F.2d 1058, 1062 (5th Cir. 1987).

Next, Petitioner argues that instead of following TABC procedures and protesting the application based upon a valid statute or ordinance, Respondents called the local TABC agent and asked him to hold the application without notification to Petitioner. *See* Petition, pp. 4, 21(3). Importantly, Petitioner fails to identify what TABC procedures were violated and/or not followed. Nevertheless, as the record demonstrates, this was not a standard approval/denial process for Respondent Rounsavall and/or Respondent City. Specifically, the record reflects that Respondent Rounsavall had initially approved the Beer and Wine permit for Location B and that after learning of physical change in buildings that Respondent Rounsavall determined that the Beer and Wine Permit had been issued in error. Assuming *arguendo* that Respondents failed to follow proper TABC procedure, this is not sufficient evidence that ill will or illegitimate animus motivated Respondents' actions. Furthermore, Petitioner

alleges that Respondents secretly requested Maloney to "hold" Petitioner's application. *See* Petition, p. 21(3). This position is based on hearsay and is unsupported by the competent summary judgment evidence. More specifically, on or about March 14, 2000, Respondent Rounsavall notified Petitioner that he was protesting Petitioner's Location B Beer and Wine Permit application. (R 249: 3-6, 118 (JR Depo 62:3-6), 251). Accordingly, there was no conspiracy to "secretly" hold Petitioner's application. Moreover, even if Respondents had asked Maloney to "hold" the permit without Petitioner's knowledge, this does not demonstrate that Respondents did so out of spite or ill will toward Petitioner.

Furthermore, in an attempt to overcome summary judgment, Petitioner argues that the "grandfather clause" did not apply because the Rodriguezes did not purchase Petitioner's business and/or did not purchase Lawson's building. *See* Petition, p. 23. Assuming *arguendo* that when Petitioner moved out of Location A and the Rodriquezes moved into and leased Location A that said action would not constitute a "transfer" of business and/or premises as stated in the statute, the evidence demonstrates that the "grandfather clause" motivated Respondents' actions regarding the issuance of a Beer and Wine Permit for Location A. (R 249: 3-6, 114 (JR Depo 48:20-23), 118 (JR Depo 64:18-25), 119 (JR Depo 67:4-7), 121 (JR Depo 73:1-25), 131 (JR Depo 115:16-20; and 116:7-13), 139 (JR Depo 145:14-16), 139 (JR Depo 146:3-21), 207 (MGR Depo 64:6-14), 225 (MGR Depo 132:7-11; 133:6-8 and 134:3-5), 229 (MGR Depo 149:2-11)). If in fact Respondents incorrectly interpreted said statute and/or mistakenly applied the "grandfather clause," "even an incorrect belief . . . constitutes a legitimate . . . reason. [The courts] do not try . . . the validity of good faith beliefs . . . Motive is the issue." *Cf. Little v. Republic Refining Co. Ltd.*, 924 F.2d 93, 96 (5th Cir. 1991).

Petitioner further asserts that Respondent Ramsey adopted a variety of meritless positions to support the City's protest of Petitioner's application. *See* Petition, pp. 20(1), 21(2). Nevertheless, Petitioner fails to provide evidence demonstrating that was the case. In fact, Petitioner admits that the only time he met with Respondent Ramsey she indicated that the ball field and day care may be the problem with Location B and that he assumed that was her position. (R 249: 70-71 (JB Depo 62:23 through 67:6), 76 (JB Depo 88:16-20)). Petitioner admits that Respondent Ramsey never made any specific statements regarding the City's position. (R 249: 74 (JB Depo 80:11-15; and 80:23 through 81:7)). In addition, Petitioner admits that he assumed that Respondent Ramsey was relying on Section 2(D). (R 249: 78 (JB Depo 95:23 through 96:8)). Moreover, Respondent Ramsey testified that the only official position regarding the issuance of a Beer and Wine Permit to Location B was the position reflected in her March 17, 2000 correspondence to Wortham regarding Terrell Christian Academy. (R 249: 202 (MGR Depo 41:18-22), 202-203 (MGR Depo 44:15 through 45:1), 203 (MGR Depo 47:1 through 48:5), 207 (MGR Depo 63:24 through 64:5), 210 (MGR Depo 73:7 through 74:20), 219 (MGR Depo 110:15-22), 237 (MGR Depo 181:3-7), 238 (MGR Depo 183:13-15), 239 (MGR Depo 188:2-8), 241 (MGR Depo 198:2-24), 252). Notwithstanding, assuming for purposes of argument that Respondent Ramsey began asserting other and/or another ordinance as the basis for protesting Petitioner's Location B application for a Beer and Wine Permit, this does not demonstrate that Respondent Ramsey and/or Respondents had ill will or illegitimate animus toward Petitioner. In fact, all that would demonstrate is that a complete legal analysis was being made regarding Location B.

Petitioner also alleges that the following additional "circumstantial evidence" supports that an illegitimate

animus or ill will motivated Respondents: (1) Respondent Ramsey would not take Wortham's calls and gave excuses to avoid dealing with the case; (2) once Jason Marshall began representing the C[illegible]he City began looking for a manner in which Petitioner could be granted the license while "the City saved face"; (3) Respondents knew Petitioner would be in serious financial trouble without the permit; (4) Petitioner was from Missouri and lived in Dallas while Lawson lived in Terrell and has known Ramsey for most of his life; (5) Ramsey responded to Mallard but not to Wortham; (6) a copy of Rounsavall's April 12 letter to the TABC was not provided to Petitioner until after the litigation began; (7) the same ordinances and statutes should have been applied uniformly to Beeler in Location B and Lawson's tenant in Location A; (8) Respondents used the "grandfather clause" position to help Lawson's tenant get a permit; and (9) the City recognized state laws when convenient and did not recognize state laws when convenient. *See* Petition, pp. 21(4), (5), (9)-(11), 22(12)-(15). Said "circumstantial evidence" amounts to improbable inferences and unsupported speculation. Furthermore, said evidence is not competent summary judgment evidence and does not support Petitioner's "class of one" equal protection claim; therefore, Petitioner failed to demonstrate a genuine issue of material fact regarding his claim.

Petitioner further argues that because information regarding the percentage of beer and wine sales from Location A was provided to Respondent Ramsey on March 21, 2000, the fact that Respondents did not certify Petitioner's application until July 27, 2000 proves Respondents acted with ill will and/or illegitimate animus. *See* Petition, pp. 10 and 21(7). Notably, Respondent Rounsavall was not provided with this information. (R 249: 109 (JR Depo 26:8-20; 27:24 through 28:2), 127 (JR Depo 97:1-7)). Moreover, the record demonstrates that between March

15, 2000 and June 2000, Petitioner had filed two lawsuits regarding the matters at issue. (R 249: 7-31, 33-53, 177 (MW Depo 27:23 through 28:2)). Therefore, litigation was pending during this time frame and the City was attempting to get the TABC to act without the City's certification. (R 249: 7-9, 273). As noted above, the City's certification was being withheld based on Ordinance 1939 which clearly applied to the circumstances at bar. Accordingly, contrary to Petitioner's assertion, said evidence is insufficient to demonstrate ill will or illegitimate animus on the part of Respondents.

Moreover, Petitioner asserts that in 1998 (without identifying a specific date), Respondent Rounsavall told a third party with the TABC, Winston Smith, that certification for a Beer and Wine Permit for Location B would not violate any City ordinance. *See* Petition, p. 3. Assuming this hearsay evidence is true, Ordinance 1939 did not become effective until October 1998. Ordinance 1345, the predecessor to Ordinance 1939, only prohibited the selling of beer and wine where the place of business was within three hundred (300) feet of any other educational institution. (R 249: 284). Terrell Christian Academy was not within 300 feet of Location B; therefore, Respondent Rounsavall would have been correct in early 1998. Thus, this "evidence" does not demonstrate ill will or illegitimate animus toward Petitioner.

Finally, Respondents did have a rational basis for their actions relative to Petitioner. Namely, Ordinance 1939 provides that "[i]t shall be unlawful for any person to sell or engage in the business of selling alcoholic beverages within the City where the place of business is within 300 feet of any church, public hospital or within 1,000 feet of public schools or other educational institutions." (R 249: 286) (emphasis added). Petitioner's new location of business, Location B, was within 740 feet of Terrell Christian Academy, a private educational institution. (R 249: 3-6,

130 (JR Depo 111:21 through 112:7), 281). Clearly, Ordinance 1939 applied to Petitioner's new location of business. Moreover, the evidence demonstrates that Respondents City and Rounsavall certified the Rodriguez' application for Location A based on the "grandfather clause." (R 249: 3-6, 114 (JR Depo 48:20-23), 118 (JR Depo 64:18-25), 119 (JR Depo 67:4-7), 121 (JR Depo 73:1-25), 131 (JR Depo 115:16-20; and 116:7-13), 139 (JR Depo 145:14-16), 139 (JR Depo 146:3-21), 207 (MGR Depo 64:6-14), 225 (MGR Depo 132:7-11; 133:6-8 and 134:3-5), 229 (MGR Depo 149:2-11)). Therefore, Respondents had a rational basis for their actions.

C. The Court of Appeals properly concluded that Petitioner and his neighbor were not "similarly situated."

Petitioner alleges that Respondents delayed the certification of his application for a Beer and Wine Permit ("Beer and Wine Permit") for Location B while his neighbor, the tenant at Location A, obtained certification from Respondents without delay. The tenants at Location A received their Beer and Wine Permit in April 2000. (R 249: 145 (HR Depo 13:8-9)). Petitioner received his Beer and Wine Permit for Location B in August 2000. (R 249: 60 (JB Depo 24:11-25), 71 (JB Depo 68:22-25), 86 (JB Depo 126:16-19)). There is no dispute that Petitioner's former location of business and his new location of business were immediately next door to each other. Notwithstanding, Petitioner, doing business out of Location B, was not similarly situated as the tenants doing business out of Location A. For Petitioner's equal protection claim to be successful, Petitioner must demonstrate that "the government is treating unequally those individuals who are prima facie identical in all relevant respects." *Albiero*, 246 F.3d at 932. As discussed below, Petitioner failed to produce

evidence showing that he was intentionally treated differently than others "similarly situated."

Specifically, a Beer and Wine Permit had been granted for Location A prior to the passing of Ordinance 1939. (R 249: 57, 114 (JR Depo 45:8-12; and 47:3-19), (JB Depo 11:24 through 12:2), 153 (GL Depo 11:25 through 12:10), 207 (MGR Depo 64:6-14)). Moreover, when Petitioner began the operation of his business out of Location A in 1990, the previous business owners possessed a Beer and Wine Permit; had been certified by the City to sell beer and wine from Location A; and were selling beer and wine from Location A. (R 249: 57, 114 (JR Depo 45:8-12; and 47:3-19), (JB Depo 11:24 through 12:2), 153 (GL Depo 11:25 through 12:10), 207 (MGR Depo 64:6-14)). Petitioner continued to sell beer and wine from Location A until approximately March 15, 2000. (R 249: 62 (JB Depo 32:6-10), 64 (JB Depo 39:14-22), 164 (GL Depo 56:14-24)). Thus, Petitioner had a valid Beer and Wine Permit for Location A until March 15, 2000 when he moved out and the new tenants moved into Location A. (R 249: 62 (JB Depo 32:6-10), 64 (JB Depo 39:14-22), 164 (GL Depo 56:14-24)).

The Texas Alcoholic Beverage Code provides "[i]f at the time an original alcoholic beverage permit or license is granted for a premises the premises satisfied the requirement regarding distance from schools, churches and other types of premises established in this code and any other law or ordinance of the state or a political subdivision of this state in effect at that time, the premises shall be deemed to satisfy the distance requirements for all subsequent renewals of the license or permit." *See* TEX. ALCO. BEV. CODE § 109.59(a). Moreover, the code provides "[o]n the sale or **transfer of the premises** or the business on the premises **in which a new original license or permit is required** for the premises, the **premises shall be deemed** to satisfy any distance requirements as if the issuance of the new original permit or license were a

renewal of a previously held permit or license." *See* TEX. ALCO. BEV. CODE § 109.59(b) (emphasis added). Accordingly, when the Rodriguezes "transferred" into Location A (when Petitioner moved out) and applied for a Beer and Wine Permit for Location A, Location A was to be deemed to satisfy any distance requirement as if the Rodriguez' application was the renewal of a previously held permit or license. Thus, because Location A had been granted a Beer and Wine Permit for many years and had satisfied the distance requirements for many years, the Rodriguez' application satisfied the relevant distance requirements. In essence, Location A was grandfathered to receiving a Beer and Wine Permit and certification from the City. Respondents City and Rounsavall certified the Rodriguez' application for Location A based on the "grandfather clause." (R 249: 3-6, 114 (JR Depo 48:20-23), 118 (JR Depo 64:18-25), 119 (JR Depo 67:4-7), 121 (JR Depo 73:1-25), 131 (JR Depo 115:16-20; and 116:7-13), 139 (JR Depo 145:14-16), 139 (JR Depo 146:3-21), 207 (MGR Depo 64:6-14), 225 (MGR Depo 132:7-11; 133:6-8 and 134:3-5), 229 (MGR Depo 149:2-11)).

On the other hand, no one had ever sold beer and/or wine from Location B before or after the passing of Ordinance 1939 in October of 1998. (R 249: 77 (JB Depo 91:6-13), 154 (GL Depo 15:23 through 16:12), 208 (MGR Depo 67:6-13)). After Petitioner obtained his permit in August 2000, Petitioner was the first person to ever sell beer and/or wine from Location B. (R 249: 77 (JB Depo 91:6-13), 154 (GL Depo 15:23 through 16:12), 208 (MGR Depo 67:6-13)). Thus, the "grandfather clause" discussed above was clearly not applicable. As noted above, Petitioner's new location of business, Location B, is within: (a) 700 feet of Children's Depot Learning Center; (b) 580 feet of Our Kid's Tree House Child Care; (c) 740 feet of Terrell Christian Academy; and (d) 600 feet of a Terrell Independent School District baseball facility. (R 249: 3-6, 130 (JR Depo 111:21

through 112:7), 281). Clearly, Ordinance 1939 applied. After making a determination that Petitioner was exempted from the application of Ordinance 1939, Respondent Rounsavall certified Petitioner's application on July 27, 2000. (R 249: 3-6, 72 (JB Depo 71:3-6), 86 (JB Depo 125:20 through 126:7), 102, 121 (JR Depo 74:9-18), 122 (JR Depo 79:11-15), 130 (JR Depo 111:21 through 112:7), 277). The evidence demonstrates that Respondents did not treat Petitioner differently than similarly situated individuals. That is, Location A had an entirely different "beer-and-wine-selling" history than Location B. First, Location A had been issued a Beer and Wine Permit before the passing of Ordinance 1939 and had sold beer and wine for many years. That was not the case for Location B. (R 249: 139 (JR Depo 146:3-21)). Therefore, Petitioner and the Rodriguezes were not clearly identical in all relevant respects. The differences between their "beer-and-wine-selling" history made the difference on how Respondents and state law treated the two locations. More specifically, because of the different history, the "grandfather clause" outlined above applied to Location A while it did not apply to Location B.

Finally, Petitioner contends that the "grandfather clause" at issue does not apply to the tenants at Location A. Petitioner attempts to interpret the term "transfer" in the statute at issue. Using Petitioner's logic, Petitioner's Beer and Wine Permit would have belonged to Lawson. Notwithstanding, whether Petitioner's interpretation or Respondents' interpretation is correct, the bottom line is that Respondents applied the "grandfather clause" to the tenants at Location A; therefore, Petitioner and his neighbor were not similarly situated. (R 249: 114 (JR Depo 48:20-23), 118 (JR Depo 64:18-25), 119 (JR Depo 67:4-7), 121 (JR Depo 73:1-25), 131 (JR Depo 115:16-20; and 116:7-13), 139 (JR Depo 145:14-16), 139 (JR Depo 146:3-21), 207

(MGR Depo 64:6-14), 225 (MGR Depo 132:7-11; 133:6-8; and 134:3-25), 229 (MGR Depo 149:2-11)).

For the reasons discussed above, the Fifth Circuit Court of Appeals properly concluded that Petitioner and his neighbor were not "similarly situated."

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Respondents John Rounsavall, Mary Gayle Ramsey and the City of Terrell, Texas respectfully request that the Supreme Court of the United States deny the Petition for Writ of Certiorari, and for such other relief that they may show themselves justly entitled.

Respectfully submitted,

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